Supreme Court, U.S.
FILED
AUG - 7 2000
OFFICE OF THE CLERK

RECORD NO. 00-233

In The
Supreme Court of the United States

DARRELL FRAZIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petition for Writ of Certiorari

Cloud H. Miller, III
Counsel of Record
115 East 8th Street
Chuluota, Florida 32766
(407) 366-2545

Counsel for Petitioner

Marcia G. Shein
Of Counsel
1945 Mason Hill Road
Suite 200
Decatur, Georgia 30033
(404) 633-3797

THE LEX GROUP • 1205 East Main Street • Suite 2 • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

46RP

QUESTION PRESENTED

I. The United States Court of Appeals for the Sixth Circuit has rendered a decision that is inequitable in violation of the Due Process Clause of the United States Constitution and constitutes a fundamental miscarriage of justice, thereby calling for the exercise of the Supreme Court's supervisory power.

A. Where no rule or law, under the AEDPA or local rules, set forth the requisites of filing a §2255 Motion, in terms of timeliness, does reliance on information received from the Clerk of the district court create a basis for equitable tolling, when said information was later deemed erroneous, thereby causing the §2255 Motion to be dismissed, as "untimely", for being one day late.

B. Was Petitioner denied equal protection through the Sixth Circuit's refusal to remand the case to the district court for determination of the §2255 Motion on the merits, where the Sixth Circuit had previously granted such a remand to a previous, similarly-situated petitioner, whose similar "timeliness" issue was based on the same "mailing" question as presented above.

C. Does a challenge to a criminal sentence, allegedly in violation of the Statutes, Sentencing Guidelines, and Eighth Amendment of the Constitution require more than minimal due process protection, thereby outweighing the adherance to an arbitrary statute of limitations, and calling for the review of such claims to avoid a manifest injustice.

LIST OF ALL PARTIES

The following is a list of all parties to the proceeding in the Court of Appeals for the Fifth Circuit:

1. **DARRELL FRAZIER,**
   Defendant/Appellant/Petitioner;

2. **UNITED STATES OF AMERICA,**
   Plaintiff/Appellee/Respondent.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

ISSUES & ARGUMENTS 5

I. The United States Court of Appeals for the Sixth Circuit has rendered a decision that is in conflict with decisions of the United States Supreme Court and other United States Circuit Courts of Appeal, regarding the below issues, thereby calling for the exercise of the Supreme Court's supervisory power. 5

A. Where no rule or law, under the AEDPA or local rules, set forth the requisites of filing a §2255 Motion, in terms of timeliness, does reliance on information received from the Clerk of the district court create a basis for equitable tolling, when said information was later deemed erroneous, thereby causing the §2255 Motion to be dismissed, as "untimely", for being one day late.....5

B Was Petitioner denied equal protection through the Sixth Circuit's refusal to remand the case to the district court for determination of the §2255 Motion on the merits, where the Sixth Circuit had previously granted such a remand to a previous, similarly-situated petitioner, whose similar "timeliness" issue was based on the same "mailing" question as presented above.....14

C Does a challenge to a criminal sentence, allegedly in violation of the Statutes, Sentencing Guidelines, and Eighth Amendment of the Constitution require more than minimal due process protection, thereby outweighing the adherance to an arbitrary statute of limitations, and calling for the review of such claims to avoid a manifest injustice. 16

CONCLUSION.....18

APPENDIX:

Memorandum Opinion,
United States Court of Appeals
For the Sixth Circuit
entered 5/9/00 ..... App. 1

Order,
United States Court of Appeals
For the Sixth Circuit
entered 8/18/99 ..... App. 4

Order,
United States Court of Appeals
For the Sixth Circuit
entered 12/22/98 ..... App. 6

Order,
United States District Court
For the Eastern District of Tennessee
At Chattanooga
entered ..... App. 8

United States District Court
For the Eastern District of Tennessee
At Chattanooga
entered October 30, 1997 ..... App. 9

Motion to Dismiss Appeal for
Lack of Jurisdiction,
United States Court of Appeals
For the Sixth Circuit
dated 10/15/98 ..... App. 15

TABLE OF AUTHORITIES

CASES

Andrews v. Orr
851 F.2d 146 (6th Cir. 1988) 12

Baldwin County Welcome Center v. Brown
466 U.S. 147, 104 S.Ct. 1723,
80 L.Ed.2d 196 (1984) 8, 9

Bounds v. Smith
430 U.S. 817, 52 L.Ed.2d 72,
97 S.Ct. 1491 (1977) 17

Brown v. O'Dea
187 F.3d 572 (6th Cir. 1999) 15

Butler v. Coral Volkswagen, Inc.
804 F.2d 612 (11th Cir. 1986) 8

Coleman v. Thompson
501 U.S. 722 (1991) 13

Freeman v. United States Postal Service, et. al.
1991 U.S. Dist. Lexis 16787,
Case No. 91-C-1459 (11/15/91) 9

Hollins v. Department of Corrections
191 F.3d 1324 (11th Cir. 1999) 8, 9

Holmberg v. Armbrecht
327 U.S. 392 (1946) 18

Irwin v. Veterans Administration
471 U.S. 1022, 105 S.Ct. 2034 (1985) 8, 9

Leal v. United States
No. 97-1757 (6th Cir. 1998) 14, 15

Lindh v. Murphy
117 S.Ct. 2059 (1997) 1, 13

Lonchar v. Thomas
517 U.S. 314 (1996) ..... passim

Osterneck v. Ernst & Whinney
489 U.S. 169, 109 S.Ct. 987,
103 L.Ed.2d 146 (1989) 13

Parkins v. Brown, Secretary, Department of Veteran Affairs, Veterans Administration
Civil No. 94-357-JD (1995),
U.S. District Court 7287 (5/26/95) 12

Pinion v. Dow Chemical, USA
928 F.2d 1522 (11th Cir. 1991) 8

Reece v. Georgia
350 U.S. 85, 76 S.Ct. 167,
100 L.Ed. 77 (1955) 17

Thompson v. INS
375 U.S. 384, 84 S.Ct. 397,
11 L.Ed.2d 404 (1964) 13

United States v. Frazier
936 F.2d 262 (6th Cir. 1991) 3

United States v. Patterson
211 F.3d 927 (5th Cir. 2000) 9

Wainwright v. Sykes
433 U.S. 72, 97 S.Ct. 2497,
52 L.Ed.2d 594 17

Willis v. Newsome
747 F.2d 605 (11th Cir. 1984) 8

Zipes v. Trans World Airlines, Inc.
455 U.S. 385 (1982) 18

CONSTITUTIONS AND STATUTES

Title 21 U.S.C. 841(b)(1)(A) 3

Title 21 U.S.C. 846 2

Title 28 U.S.C. 1254(1) 1

Title 28 U.S.C. 2244(d), §101 2

Title 28 U.S.C. 2254(d)(1)(A)-(D) 1

Title 28 U.S.C. 2255 ..... passim

RULES AND OTHER CITATIONS

Anti-Terrorism & Effective Death Penalty Act
of 1996 (AEDPA) ..... passim

Federal Habeas Corpus, A Second and
Revised Edition of a Handbook of
Federal Habeas Corpus, Ronald P.
Sokol, 1969, pg. 145 10

Federal Rule of Appellate Procedure, Rule 3(c) 4

Federal Rule of Criminal Procedure, Rule 11(e) 2

Rules Governing 2255 Proceedings, Rule 3(b) 11

Supreme Court Rule 13.4 1

OPINIONS BELOW

As to the denial of Petitioner's Title 28 U.S.C. §2255 Motion in the United States District Court, and the Sixth Circuit Court of Appeals denial on appeal, there are no other reports or opinions. The above-referenced documents and opinions can be found in the Appendix, beginning at App. 1.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Given the Judgment of the United States Court of Appeals for the Sixth Circuit, filed on May 9, 2000, the jurisdiction of this Honorable Court is invoked under Title 28 U.S.C. §1254(1).

The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

In pertinent part, the Anti-Terrorism & Effective Death Penalty Act ("AEDPA") of 1996 established a one-year limitation on filing habeas corpus petitions. This "one year" is said to run from the latest of the following dates: (1) final judgment on direct review, or "the expiration of the time for seeking such review"; (2) the removal of any state-imposed impediment that unconstitutionally prevented the filing of such a petition; (3) the Supreme Court's recognition of a new, retroactively applicable constitutional right; and (4) the emergence or recognition of any new facts supporting the Petitioner's claim that "could have been discovered through the exercise of due diligence." See Title 28 U.S.C. 2254(d)(1)(A)-(D).

In **Lindh v. Murphy**, 117 S.Ct. 2059 (1997), the court ruled that the AEDPA would not be retroactively applied to any non-capital habeas petitions that were pending

as of April 24, 1996. The one-year statute of limitations begins to run at the occurrence of any of the four mentioned dates. This application of law has been construed to affect pleadings pursuant to Title 28 U.S.C. §2255, as amended by the AEDPA. See 28 U.S.C. §2244(d), §101.

Due process requirements under the Fifth Amendment of the constitution of the United States set forth that no person shall . . . be deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

Petitioner was indicted in the Eastern District of Tennessee on June 20, 1989, and charged with *Conspiracy to Distribute Cocaine Hydrochloride*, a Schedule II narcotic controlled substance, in violation of 21 U.S.C. §846. Petitioner was arrested on June 23, 1989, and was held without bail.

On August 9, 1989, a Superseding Indictment was filed, again charging Petitioner with *Conspiracy to Distribute and Possession for the Purpose of Distributing Cocaine* in the Eastern District of Tennessee.

On August 21, 1989, Petitioner, with appointed counsel, Charles Dupree, appeared in the U.S. District Court for arraignment. A plea of not guilty was entered by Petitioner.

On September 20, 1989, Petitioner entered a guilty plea to Count One of the Superseding Indictment, as part of a Rule 11(e) plea agreement. The plea agreement was sealed by the court.

On October 19, 1989, Petitioner appeared in the United States District Court, contending he had inadequate representation by counsel prior to entry of his guilty plea. The court allowed Petitioner to withdraw his guilty plea, and allowed Mr. Dupree to be relieved as counsel. Attorney Jerry Sloan was then appointed to represent Petitioner. Trial was set for November 20, 1989.

On November 15, 1989, a Notice of Intent to seek enhanced punishment was filed by the government pursuant to the provisions of Title 21 U.S.C. §841(b)(1)(A). While the government listed six previous convictions, it did not specify which offenses specifically applied, as all six clearly did not.

Following a two day trial, on November 21, 1989, a verdict of guilty was returned against Petitioner as to the charge in Count One of the Superseding Indictment. Sentencing was then set for January 20, 1990. Petitioner was ultimately sentenced on January 22, 1990, and given a term of life imprisonment without release.

Petitioner appealed his conviction and sentence to the United States Court of Appeals for the Sixth Circuit, which affirmed the conviction and sentence. See **United States v. Frazier**, 936 F.2d 262 (6th Cir. 1991).

Petitioner subsequently filed a Motion, pursuant to Title 28 U.S.C. §2255, by depositing same in the United States Postal Service on April 23, 1997. However, said Motion was not "stamp-filed" in the clerk's office until April 25, 1997.

On October 20, 1997, the district court denied Petitioner's original §2255 motion, based upon the court's finding that the document was filed untimely under the strictures set out in the AEDPA.

Petitioner then filed a Motion for Reconsideration / Notice of Appeal on October 28, 1997. On October 30, 1997, the district court issued an order denying the Motion for Reconsideration and directed the clerk to transmit the Notice of Appeal to the Sixth Circuit.

On March 30, 1998, Petitioner filed a Motion for Remand with the Sixth Circuit. The basis of the Motion was that the Sixth Circuit, when faced with a similar "untimeliness" issue dealing with a 2255 petition "filed" on April 28, 1997, granted a remand to the district court for determination of the §2255 Motion on its merits. On May 29, 1998, an order was entered by the Sixth Circuit denying a

Certificate of Appealability and denying the Motion to Remand as moot.

Petitioner filed a Suggestion for Rehearing En Banc on June 10, 1998. An Order was issued by the Sixth Circuit Court of Appeals on July 2, 1998 stating that *"the panel agrees that the Certificate of Appealability should be granted. The Clerk's office is hereby directed to issue a briefing schedule as to the issue of whether Frazier's motion under 28 U.S.C. 2255 should be considered timely filed in the district court."*

Pursuant to said briefing schedule, both Petitioner and the government submitted their respective appellate briefs. However, on October 15, 1998, the government filed a Motion to Dismiss the appeal [APP: 8], asserting that the Sixth Circuit did not have jurisdiction to review the case, due to Petitioner's "Notice of Appeal" not formally setting forth the name of the court to which the appeal was to be taken - an alleged violation of F.R.App.P. Rule 3(c). On December 22, 1998, the Sixth Circuit granted the government's Motion, and dismissed the appeal [APP: 6].

Petitioner again requested a Rehearing and a Suggestion for Rehearing En Banc, this time challenging the Sixth Circuit's Order dismissing the appeal. On August 18, 1999, a panel of the Sixth Circuit granted the Rehearing [APP: 4]. Based upon an examination of recent Sixth Circuit law, the panel vacated the December Order, and denied the government's Motion to Dismiss [Id.].

After hearing oral arguments on December 17, 1999, the Sixth Circuit took the case, and issues, under advisement. Ultimately, on May 9, 2000, the Sixth Circuit issued a Memorandum Opinion, affirming the district court's order that dismissed Petitioner's §2255 as being untimely [APP: 1].

This Petition for Writ of Certiorari follows.

ISSUES AND ARGUMENTS

I. The United States Court of Appeals for the Sixth Circuit has rendered a decision that is in conflict with decisions of the United States Supreme Court and other United States Circuit Courts of Appeal, regarding the below issues, thereby calling for the exercise of the Supreme Court's supervisory power.

A. Where no rule or law, under the AEDPA or local rules, set forth the requisites of filing a §2255 Motion, in terms of timeliness, does reliance on information received from the Clerk of the district court create a basis for equitable tolling, when said information was later deemed erroneous, thereby causing the §2255 Motion to be dismissed, as "untimely", for being one day late.

Where a first habeas petition is filed with reasonable, yet detrimental reliance on a set of facts, and the petition is dismissed for a procedural default out of Petitioner's control, equitable tolling or other remedies should be defined to protect Petitioner's constitutional rights otherwise violated. This matter has not been given adequate and independent review by the lower courts and is in conflict with both the United States Constitution and the fundamental rights of prisoners to access the courts and be protected from events outside their control. See **Lonchar v. Thomas**, 517 U.S. 314, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996). The court, in *Lonchar*, stated that "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar*, 517 U.S. at 324, 116 S.Ct. at 1299.

The history of habeas corpus petitions makes plain that prejudice requirement represents a critical element in determining the dismissal of a first habeas petition without reviewing the merits of the case. Additionally, it is a fundamental miscarriage of justice not to consider the merits of a first habeas petition when looking at the unique circumstances presented. While *Lonchar* was decided before the passage of the AEDPA, it does not suggest a limitation on equitable relief, consistent with unique circumstances, or attempts to file timely, though unsuccessful, based on detrimental reliance on information from a judicial officer. "[T]he interest in permitting federal habeas review of a first petition is quite strong." *Lonchar*, 517 U.S. at 330, 116 S.Ct. at 1302.

Given the importance of a first habeas petition, it is particularly important that any rule that would deprive inmates of all access to the writ should be clear and fair. No such fairness is evidenced looking at the circumstances and counsel's detrimental reliance as being the error which caused the defendant to be deprived of first habeas review on the merits. It is difficult to discern how Congress, in establishing a one-year time limitation, could have possibly anticipated issues that would arise from unique circumstances concerning counsel's representations - something totally outside the control of a petitioner.

Petitioner, in the present case, filed his §2255 motion by and through counsel, who mailed the petition and placed it in the care and trust of the United States Postal Service, with adequate postage affixed thereto, on April 23, 1997. In good faith, and through due diligence, Petitioner's counsel called the Clerk of the District Court in Chattanooga, Tennessee, to determine how that particular District Court was handling filings, via mail, and how the date of filing is determined from the AEDPA (e.g., date of mailing via postal service or date of delivery). The clerk's office, responding to the inquiry, verified that the date of mailing would be used

for purposes of determining the filing of the Federal Habeas *Corpus Petition.*

Based on this telephone call, and acting in good faith, counsel filed Petitioner's motion through the U.S. Postal Service on April 23, 1997, instead of delivering said motion via overnight courier. Overnight couriers, as well as other delivery procedures were, in fact, utilized in other cases where the Clerk of various other District Courts had stated that the §2255 motions must be in the Clerk's Office by April 24th to be filed timely.

Therefore, counsel made a good faith and diligent effort to make sure that Petitioner's §2255, as well as those of other clients, were timely filed as instructed by the Clerk's offices as to filing dates. Counsel believed, in good faith, that by contacting the Clerk's offices, following local and appellate rules, that she would be properly and intelligently advised as to the rules applicable to each case in those particular courts.

There is no local rule in the Eastern District of Tennessee that states that the date of receipt is to be considered the date of filing, *nor* that the date of mailing cannot be construed as the filing date. Since the Eastern District of Tennessee had not adopted a local rule which deemed a document "filed" upon mailing, nor one that set out that a document is considered "filed" upon receipt in the Clerk's Office, and given that a §2255 Motion is a civil proceeding - governed by the Federal Rules of Civil Procedure, it is difficult to discern how the District Court, as well as the Sixth Circuit, could find that the document was untimely simply because it was mailed on April 23, 1997, before the expiration of time limit set out in the AEDPA, instead of being received in the Clerk's Office on that date. The presumption, therefore, exists that the proper filing of the petition for habeas corpus relief was evidenced through the exercise of due diligence. Detrimental reliance of the court's instructions cannot act as a bar to habeas relief.

Petitioner respectfully asserts that the doctrine of "unique circumstances", involving detrimental reliance on a judicial officer's instructions, should be considered as a basis for equitable tolling in order to avoid deprivation of a first habeas petition, as such deprivation would be contrary to Petitioner's Fifth and Sixth Amendment rights.

"Equitable tolling" has been afforded to defendants in private suits and suits against the United States (§2255 motion is a civil action against the United States Government for claimed constitutional deprivations). See **Irwin v. Veterans Administration**, 471 U.S. 1022, 105 S.Ct. 2034 (1985). In *Irwin*, the Supreme Court noted that the federal courts have allowed equitable tolling in situations in which the claimant diligently sought judicial review by filing an effective pleading during the statutory period, as well as in cases in which the complainant had been induced by his adversary to filing after a deadline had passed. See also **Baldwin County Welcome Center v. Brown**, 466 U.S. 147, 104 S.Ct. 1723, 1726, 80 L.Ed.2d 196 (1984) (doctrine of equitable tolling may be applied where a court has led a plaintiff to believe that she had done all that is required of her).

In **Hollins v. Department of Corrections**, 191 F.3d 1324 (11th Cir. 1999), the Eleventh Circuit stated that "lenient formulation of the 'unique circumstances' exception concerning the timely filing of habeas corpus petitions can be based upon the reasonable reliance on a judicial officer's assurances of a particular requirement." See **Pinion v. Dow Chemical, USA**, 928 F.2d 1522, 1529 (11th Cir. 1991). This case provides that any judicial action, prior to the expiration of the relevant time period for any appeal, that could have lulled the appellant into inactivity, may permit application of the "unique circumstances exception" and allow for a timely filing. *Pinion* at 1531 (quoting **Butler v. Coral Volkswagen, Inc.**, 804 F.2d 612, 617 (11th Cir. 1986) (quoting **Willis v. Newsome**, 747 F.2d 605 at 606 (11th Cir. 1984).

In **United States v. Patterson**, 211 F.3d 927 (5th Cir. 2000), the Fifth Circuit, in reversing a dismissal of a §2255 Motion based on untimeliness, stated that "[e]quitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights". *Patterson*, 211 F.3d at 930 (citation and internal quotes omitted). As such, and given that Patterson relied on the district court's dismissal of his §2255 without prejudice, for purposes of re-filing at a later date, the Fifth Circuit found "equitable tolling" warranted.

In **Freeman v. U.S. Postal Service, et. al.**, 1991 U.S. Dist. Lexis 16787, Case No. 91-C-1459 (Nov. 15, 1991), the court rejected the plaintiff's motion for equitable tolling on the premise that he received a constructive written notice that he had 30 days to file his complaint from the date his EEOC complaint was denied. Freeman went to the court clerk and was advised that he had 90 days to file his complaint in the Federal Court. Such advice was erroneous in light of the constructive notice received by Freeman from the EEOC with the 30 day time limit identified.

In the present case, the facts and circumstances warrant a holding consistent with the findings in *Irwin*, *Brown*, *Patterson* and *Hollins*. Again, the clerk of the district court advised Petitioner's counsel that the date of mailing would be considered as the filing. In reliance on such information, rather than opting to overnight the §2255 motion to the district court, Petitioner's counsel sent said motion through the mail. To Petitioner's detriment, the motion was deemed by the district court to be "untimely", as it arrived one day past the date of April 24, 1997, which was arbitrarily said to have been the end of Petitioner's "reasonable period" for which to file his §2255 motion. There existed no constructive notice from the district court concerning the date in which filing would be considered "perfected", other than the information received from the Clerk, to wit: that the date of mailing would be considered

for a timely filing. Furthermore, there was no local rule to suggest anything contrary to the Clerk's information. Finally, there was no notice, constructive or implied, that the rejection of a habeas petition could result if it was not filed, via adequate postage and mailing, on a date prior to the arbitrary, court-determined date for filing under the AEDPA. Therefore, without some type of constructive notice that mailing the document in advance of the "one-year deadline" would keep a petitioner from being able to determine that such a deadline existed, reliance on the clerk's advice would then be totally reasonable.[1]

It must be remembered that the AEDPA put new restrictions on the filing of §2255 Motions. The AEDPA was not a model of clarity on the issue of timely filing, and it was left up to the various court's interpretations to determine the limits of the "one-year" time restriction, as well as what would constitute an adequate filing. As there existed differing interpretations from the courts as to what constituted a "reasonable time" to file said Motions, along with differing opinions as to whether the Motion had to mailed or actually received by the end of the "reasonable period, the Clerks of the various courts were the appropriate

---

[1] The Ninth Circuit has concluded that "the discovery-interrogatory procedure of Rules 26 and 33 is not available in habeas corpus proceedings." **On the other hand, those rules dealing with...and computation of time (Rule 6)**, to the extent that they are relevant, **may be appropriately applied. To a considerable extent the practice probably varies from circuit to circuit and is largely unreported. To that extent guidance must be sought from the clerk of court. In fact, it is *always* a wise precaution to check with the clerk of court if any question arises. The clerk of court is usually an invaluable source of information. *His knowledge of the Federal Rules is usually far superior to that of most lawyers.* In addition, there are many minor matters of procedure about which the rules are frequently silent. When such matters crop up...the answers should be sought from the clerk**. [*Federal Habeas Corpus, A Second and Revised Edition of A Handbook of Federal Habeas Corpus*, Ronald P. Sokol, 1969, pg 145).

avenues of receiving the necessary filing instructions. Petitioner, nor his counsel, were remiss in relying on the information from the Clerk. Even the actions of the Clerk of the district court are supportive of a finding that there existed reasonable reliance. According to Rule 3(b) of the Rules Governing Section 2255 Proceedings, "[u]pon receipt of the motion and having ascertained that it appears on its face to comply with rules 2 and 3, the clerk shall file the motion . . ." Obviously, if not relying on its own information that the date of mailing made the motion timely, then the Clerk had no reason to file the motion on the 25th of April, as the motion was "on its face" one day late. Instead, the Clerk properly filed the motion.

Reasonable reliance on a judicial officer's assurances concerning a particular procedure are grounds for which the court, under unique circumstances, can make an exception and allow the §2255 to be considered timely filed and reviewed. The decisions of both, the district court and Sixth Circuit, is contrary to the above-cited case law, as neither properly considered the doctrine of "equitable tolling"/"unique circumstances", surrounding the reliance on the judicial officer's (Clerk) statement that mailing would be adequate for timely filing, as being reasonable to support the district court reviewing the merits of the Petitioner's first habeas petition. "Equitable tolling" is an appropriate remedy where certain criteria exist, and courts regularly consider five factors when determining whether to invoke the doctrine. The District Court and Sixth Circuit did not apply this principle, in violation of case law precedent.

> (1) Lack of **actual** notice of filing requirement: Petitioner lacked complete notice of any filing requirement different from what was done in filing the motion before the one-year date of the passage of the AEDPA through adequate postage in the United States Mail;

(2) Lack of **constructive** notice of filing requirement: there was no notice in the district court rules suggesting that the manner and means in which the case was filed was incorrect;

(3) **Diligence** in pursuing one's rights: all due diligence was initiated, including a telephone call to the clerk's office to ensure that counsel did not have to mail the document overnight;

(4) **Absence of prejudice** to defendant: since the prejudice is obvious in the deprivation of both the Sixth Amendment and a Tenth Amendment right, equitable tolling applies; and

(5) **Reasonableness** of Petitioner's ignorance of the notice requirement: it is reasonable to believe that neither counsel, and particularly the defendant, would have known that the filing requirements were different than what was investigated/advised. See **Andrews v. Orr**, 851 F.2d 146 (6th Cir. 1988). Even excusable ignorance is a factor where equitable tolling would allow for timely filing. See **Parkins v. Brown, Secretary, Dept. of Veteran Affairs, Veterans Admin.**, Civil No. 94-357-JD (1995), U.S. District Court 7287, decided May 26, 1995.

Petitioner should have been afforded the protection of equitable tolling and lack of proper notice to any other form of filing other than what was perfected. The lower courts did not consider this question as applied to first habeas petitions. See **Lonchar v. Thomas**, 517 U.S. 314 (1996). The question before this Honorable Court is too serious to ignore relative to protecting the Petitioner from the suspension of his right to habeas review based on procedural default outside his control. In addition, there is a fundamental miscarriage of justice, based on procedural default, in that

the Petitioner has been denied access to the courts, as well as not being given the opportunity to have the merits of his first habeas reviewed. See *Lindh v. Murphy, supra.* This acts as a suspension of Petitioner's habeas corpus rights in violation of the Suspension Clause of the Tenth Amendment. Such constitutes a fundamental miscarriage of justice. See **Coleman v. Thompson**, 501 U.S. 722 (1991).

As the AEDPA does not have any express language defining what constitutes a filing, and based on the totality of the circumstances, including the execution of due diligence, "equitable tolling" is warranted, in this case, to avoid (I) a miscarriage of justice; (ii) a procedural default based, in no part, on Petitioner's actions; and/or (iii) the violation of one constitutional right (Fifth and Sixth Amendments) to the deprivation of another (Suspension Clause of the Tenth Amendment).

This Honorable Court should review this in conjunction with the Supreme Court decision in **Osterneck v. Ernst & Whinney**, 489 U.S. 169, 179, 109 S.Ct. 987, 993, 103 L.Ed.2d 146 (1989). See also **Thompson v. INS**, 375 U.S. 384, 387, 84 S.Ct. 397, 398-99, 11 L.Ed.2d 404 (1964). This Honorable Court has previously set forth that, in a situation where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal, and has received specific assurance by a judicial officer that this act has been properly done, said party should be given consideration for same as a timely filing of the matter in dispute. This is a first habeas, it has statutory significance and is a critical stage in criminal defendant proceedings. Therefore, this Honorable Court should take into consideration these factors in determining this case.

B Was Petitioner denied equal protection through the Sixth Circuit's refusal to remand the case to the district court for determination of the §2255 Motion on the merits, where the Sixth Circuit had previously granted such a remand to a previous, similarly-situated petitioner, whose similar "timeliness" issue was based on the same "mailing" question as presented above.

Aside from the failure to properly consider the "equitable tolling" aspect of the case, Petitioner also points to the differing opinions within the Sixth Circuit Court of Appeals, itself, when dealing with the same issue.

In **Leal v. U.S.**, No. 97-1757 (6th Cir. 1998), the Sixth Circuit was presented with a similar "timeliness" issue, as the §2255 motion in that case was mailed prior to April 24, 1997, but not considered filed until it was "stamped" on April 28th. Based on a motion by the government, which conceded that Leal's §2255 was timely and asked for a remand, the Sixth Circuit granted the remand to the district court, for determination of the §2255 Motion on its merits, and dismissed the appeal.

As set out in the facts above, Petitioner filed a similar Motion for Remand with the Sixth Circuit on March 30, 1998. The basis of Petitioner's motion was the disposition in *Leal*. However, on May 29, 1998, the Sixth Circuit denied the Motion to Remand as moot.

What is disturbing is that the Sixth Circuit allowed the government's request to remand a case, under virtually the same circumstances presented by Petitioner, then subsequently denied Petitioner's request for remand on those similar circumstances.

The inconsistencies are irreconcilable and prejudicial to Petitioner. Though the *Leal* case is not a "precedent," it does have some bearing on the totality of the circumstances

surrounding the constitutional rights of Petitioner and the presentation of his §2255 Motion, and the requested relief therein.

It should make no difference that this case, and that of *Leal*, were presided over by different panels of the Sixth Circuit, nor should it make a difference that the government made the request in *Leal*, while Petitioner sought the remand himself. Both cases involved a §2255 motion, mailed before April 24th, but received by the clerk's office after April 24th. Both cases involved dismissals of the Motions, due to being untimely. Both cases challenged the "timeliness" issue in the Sixth Circuit Court of Appeals. Both of the "timeliness" challenges were presented to the Sixth Circuit, prior to that court's 1999 conclusion that April 24, 1997 was the filing deadline. See **Brown v. O'Dea**, 187 F.3d 572, 576 (6th Cir. 1999).

Allowing the remand in *Leal*, for a motion that was some four (4) days past the close of the one-year "window", while denying Petitioner a similar remand for his one-day late motion, reeks of "equal protection" problems. It can hardly be "moot" for Petitioner to be expected to be treated the same, under the law, as a similarly situated petitioner (*Leal*). *Leal*'s §2255 was clearly untimely under the same "hard-line" stance the Sixth Circuit took with Petitioner. Yet, *Leal* received the benefit of the "mailing date" while Petitioner did not.

Either the date of mailing satisfies the filing requirement, or it does not. For the Sixth Circuit to decide that one petitioner should be allowed to proceed, while denying another petitioner equal opportunity to proceed, without any justification, makes the Sixth Circuit's dispositions appear arbitrary and not based on any rule or law. This should not be held to acceptable. As set out in *Lonchar*:

> "[t]here is no such thing in the law, as Writs of Grace and Favour issuing from

> the Judges. Rather courts of equity must be governed by rules and precedents no less than the courts of law. As Seldon pointed out so many years ago, the alternative is to use each equity chancellor's conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot."

Lonchar, 116 S.Ct. at 1298 (internal quotes and citations omitted).

Given the above, Petitioner respectfully requests that he be allowed the same opportunities given to similarly situated habeas petitioners. As such, he asks that this Honorable Court render a decision that would allow his §2255 motion be remanded to the district court for determination on the merits.

C Does a challenge to a criminal sentence, allegedly in violation of the Statutes, Sentencing Guidelines, and Eighth Amendment of the Constitution require more than minimal due process protection, thereby outweighing the adherance to an arbitrary statute of limitations, and calling for the review of such claims to avoid a manifest injustice.

An opportunity to collaterally attack a constitutional violation is not a fundamental right, entitled to "heightened" due process protection. However, where a defendant will be forced to serve out an excessive sentence, in violation of the Statutes, Sentencing Guidelines, and the Eighth Amendment, due to such claims being barred by an arbitrary statute of limitations, the efficiency and economy of a time-bar is

insufficient to outweigh a petitioner's interests/rights to be properly sentenced under the law and to be free from cruel or unusual punishment. Therefore, it is urged that "heightened" due process protections are warranted.

It has been held that it is possible, under the circumstances of a particular case, that the application of a statute of limitations may not afford a reasonable opportunity to have a claimed issue reviewed and decided. See **Reece v. Georgia**, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed 77 (1955). Due process requires that a petitioner be afforded a reasonable opportunity for presentation of claims, at a meaningful time and in a meaningful manner. Where, as in the present case, Petitioner had his claims dismissed as being "untimely, for reasons not attributable to Petitioner, himself, such a dismissal creates a manifest injustice. In the truest sense, Petitioner was not afforded a reasonable opportunity to present his claims as the default was not of his own doing. The interests of justice should not allow a petitioner to be punished by foreclosing meritorious claims worthy of relief.

In the present case, the §2255 Motion was arguably one day late. However, said Motion survived preliminary consideration of its merits and constitutional questions. As such, the government was ordered to answer Petitioner's Motion. After requesting additional time to respond, the government finally moved for dismissal of the motion for timeliness.

To deny Petitioner access to the courts, via habeas corpus, for procedural default, considering the time limitations of such motions, is to deny him a constitutional right to habeas corpus relief at all, or meaningful access to the courts in a critical stage of his criminal case. **Bounds v. Smith**, 430 U.S. 817, 52 L.Ed.2d 72, 97 S.Ct. 1491 (1977). The federal courts have never embraced a view of habeas jurisdiction that resulted in an "airtight" system of procedural forfeitures. See **Wainwright v. Sykes**, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594.

As the time limitation of the AEDPA is procedural, and not jurisdictional, and there is normally only minimal due process protections involved, the circumstances of the present case call for the requested "heightened" protections. This is the only way that Petitioner could be afforded the chance to challenge his unlawful sentence, and relief the manifest injustice created by the statute of limitations allegedly barring such a claim.

CONCLUSION

Petitioner has a liberty interest in having his first habeas presented, on the substantive issues, without having to be punished for procedural defaults outside of his control. Petitioner's attorney developed and timely mailed a §2255 Motion which failed to be time date stamped by the clerk prior to the expiration of the one year statute of limitations. The "late filing" was outside the control of Petitioner. Petitioner further asserts that if other impediments to the timely filing of a §2255 could have occurred which would have created a late filing, to no fault of his, such should not prohibit the court's consideration of the pleadings on the merits.

This Honorable Court must decide if a habeas corpus petition can be denied due to real or perceived procedural error, or detrimental reliance of an attorney outside the control of the Petitioner in violation of his 5th, 6th and 10th Amendment rights. Petitioner is not, per se, entitled to counsel in habeas representation. However, if a Petitioner retains counsel, they do not, in turn, give up their right to effective assistance of counsel for procedural matters.

We proposition that there needs to be a means for equitable tolling to ensure that justice is protected when it comes to a first Writ of Habeas Corpus. *Cf.* **Lonchar v. Thomas**, 517 U.S. 314, 324 (1996); **Zipes v. Trans World Airlines, Inc.**, 455 U.S. 385 (1982) and **Holmberg v. Armbrecht**, 327 U.S. 392 (1946) (Unless Congress states

otherwise, equitable tolling should be read into every federal statute of limitations).

Based on the facts and case law presented, it is urged that this case be remanded to the District Court for consideration of the substantive issues of Petitioner's first habeas.

Cloud H. Miller, III
Counsel of Record
115 East 8th Street
Chuluota, FL 32766
(407) 366-2545

Attorney for Petitioner

Marcia G. Shein
1925 Mason Hill Road
Suite 200
Decatur, GA 30033
(404) 633-3797

Of Counsel

ENTERED
MAY 9 2000
LEONARD GREEN,
Clerk

NOT RECOMMENDED FOR PUBLICATION

No. 97-6338

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARRELL FRAZIER	)
	)
Petitioner-Appellant,	)
	)
v.	)
UNITED STATES OF AMERICA	)
	)
Respondent-Appellee.	)

MEMORANDUM
OPINION

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

BEFORE: BOGGS and NORRIS, Circuit Judges; NUGENT, District Judge.*

---

* The Honorable Donald C. Nugent, United States District Judge for the Northern District of Ohio, sitting by designation.

PER CURIAM. Since the filing of briefs in this appeal this court has ruled that the filing deadline for a petition for a writ of habeas corpus by a petitioner who was convicted prior to the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 is April 24, 1997. *Brown v. O'Dea*, 187 F.3d 572, 576 (6th Cir. 1999). Accordingly, the district court's ruling in that regard was correct.

Furthermore, the district court correctly held that the petition, mailed to the court by counsel, was filed when it was received by the clerk of courts, rather than when it was mailed. *See* RULES GOVERNING SECTION 2255 PROCEEDINGS Rule 3(b); *Torras Herreria y Construcciones, S.A.v. M/V Timur Star*, 803 F.2d 215 (6th Cir. 1986); the Supreme Court's opinion in *Houston v. Lack*, 487 U.S. 266 (1988), is of no assistance to petitioner since its holding, that deposit in the prison mail room is tantamount to filing, applies only to prisoners proceeding without the assistance of counsel.

In support of two issues raised in the appeal, petitioner essentially contends that the late filing of his petition for writ of habeas corpus should be excused as the product of a violation of his federal constitutional right to effective assistance of counsel. However, as petitioner does not enjoy such a constitutional right in this case, the issues are not well taken. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Ritchie v. Eberhart*, 11 F.3d 587, 592 (6th Cir. 1993) (no constitutional right to effective assistance of counsel in preparation of original federal habeas corpus petition).

And finally, under the circumstances of this case, we are unable to say that the district court abused its discretion in declining to consider misguided advice from court personnel as the basis for equitable tolling of the filing deadline for the petition for habeas corpus.

Petitioner relies on the Eleventh Circuit's lenient interpretation of the "unique circumstances" limited exception to the strict jurisdictional requirement for the

timely filing of appeals, formulated by the Supreme Court in *Thompson v. INS*, 375 U.S. 384 (1964). That exception is a narrow one, applying only "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Osterneck v. Ernst v. Whinney*, 489 U.S. 169, 179 (1989).

Contrary to the reading by other circuits that the term "judicial officer" in *Osterneck* refers only to judges, *see e.g., Moore v. South Carolina Labor Bd.*, 100 F.3d 162, 164 (D.C. Cir. 1996); *United States v. Heller*, 957 F.2d 26, 29 (1st Cir. 1992); *Center for Nuclear Responsibility, Inc. v. NRC*, 781 F.2d 935, 941 (D.C.Cir. 1986); *Myers v. Stephenson*, 748 F.2d 202, 205 (4th Cir. 1984), the Eleventh Circuit "has decided that the unique circumstances doctrine may apply where the appellant is lulled by assurances from the clerk's office instead of the district court itself." *Hollins v. Department of Corrections*, 191 F.3d 1324, 1328 (11th Cir. 1999). In *Hollins*, the court found unique circumstances in counsel's "officially invited reliance" upon the district court's electronic records system, which had promised practitioners access to official court dockets, but in this instance had failed to show entry of a final order. Counsel in the instant case, by contrast, is unable to show reliance upon any such officially invited assurance. Furthermore, this court has not subscribed to the Eleventh Circuit's lenient interpretation of the "unique circumstances" exception, and we are of the view that the other circuits, cited above, have more accurately fathomed the Supreme Court's view of the limited exception.

For the reasons set out above, the order of the district court is **AFFIRMED**.

No. 97-6338

ENTERED
AUG 18 1999
LEONARD GREEN,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARRELL FRAZIER,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent-Appellee.	)

ORDER

Before: MERRITT, NORRIS, and GILMAN, Circuit Judges.

The petitioner filed a notice of appeal from the dismissal of his §2255 petition for failure to comply with the one-year statute of limitations. On December 22, 1998, we granted the government's motion to dismiss the appeal because the notice of appeal fails to designate the court to which the appeal is taken pursuant to *United States v. Webb*, 157 F.3d 451 (6th Cir. 1998), *cert. denied*, 119 S.Ct. 2019 (1999). The petitioner petitions for rehearing of the dismissal with a suggestion for rehearing en banc. On July 21, 1999, the en banc court effectively overruled *Webb* and held that "where only one avenue of appeal exists, Rule 3(c)(1)(C) is satisfied even if the notice of appeal does not

name the appellate court." *Dillon v. United States*, --- F.3d ---, 1999 WL 511697 (6th Cir. 1999) (en banc).

Therefore, the petition for rehearing is **GRANTED**, the December 22 order is **VACATED**, and the government's motion to dismiss is **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

No. 97-6338

ENTERED
DEC 22 1998
LEONARD GREEN,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARRELL FRAZIER,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Respondent-Appellee.	)

ORDER

Before: MERRITT, NORRIS, and GILMAN, Circuit Judges.

The petitioner filed a notice of appeal from the dismissal of his §2255 petition for failure to comply with the one-year statute of limitations. The government now moves to dismiss the appeal because the notice of appeal fails to designate the court to which the appeal is taken. The petitioner opposes the motion to dismiss.

A notice of appeal is required to 1) specify the party or parties taking the appeal; 2) designate the judgment, order, or part thereof appealed from; and 3) name the court to which the appeal is taken. Fed. R. App. P. 3(c). In *United States v. Webb*, 157 F.3d 451 (6th Cir. 1998), the court held that a notice of appeal that fails to designate the court to which the appeal is taken is invalid. This Rule 3(c)

requirement is jurisdictional; thus, a defective notice of appeal cannot impart appellate jurisdiction in this court. Although the petitioner argues that the government's motion to dismiss is untimely, matters of jurisdiction can be raised at any stage of the proceedings. *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976). If jurisdiction is lacking, this court is precluded from considering the appeal on the merits. *See In re Millers Cove Energy Co., Inc.*, 128 F.3d 449, 451-52 (6th Cir. 1997); *Ford v. Hamilton Invs., Inc.*, 29 F.3d 255, 257 (6th Cir. 1994).

The motion to dismiss, therefore, is **GRANTED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

1:89-cr-56/1:97-cv-264
Edgar

UNITED STATES OF AMERICA	)
	)
v.	)
	)
DARRELL FRAZIER	)

ENTERED: October 30, 1997

ORDER

Before the Court is a motion by defendant Darrell Frazier ("Frazier") to reconsider or in the alternative, notice of appeal. On October 20, 1997, the Court denied Frazier's petition for post-conviction relief under 28 U.S.C. § 2255 because it was time-barred by the statute of limitations. The Court has again reviewed the record and is not persuaded that Frazier's § 2255 petition was erroneously denied. The Court concludes Frazier has failed to present any additional information which justifies reconsideration. For the reasons expressed in the Court's October 20, 1997 order, the motion to reconsider will be **DENIED**. The Clerk is **DIRECTED** to transmit the notice of appeal to the Sixth Circuit.

Accordingly, it is hereby **ORDERED** that defendant Frazier's motion is **DENIED**.

ENTER:

/s/ R. Allan Edgar
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
***at* CHATTANOOGA**

1:89-cr-56/1:97-cv-264
Edgar

UNITED STATES OF AMERICA	)
	)
v.	)
	)
DARRELL FRAZIER	)

ENTERED: OCTOBER 20, 1997

ORDER

Marcia G. Shein, attorney for defendant Darrell Frazier ("Frazier"), has filed a motion for post-conviction relief pursuant to 28 U.S.C. § 2255 on behalf of Frazier. Frazier contends that his judgment of conviction and sentence should be vacated, set aside, or corrected based upon the denial of Frazier's right to effective assistance of counsel as guaranteed by the Sixth Amendment. This case is presently before the Court on the United States of America's motion to dismiss and their responses to the petitioner's responses, (Court File No. 7, 9, 10, 12, & 13) and the petitioner's responses (Court File No. 8, 11). The Government's motion for an extension of time (Court File No. 5) and the petitioner's response (Court File No. 6) are **MOOT**.

Pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), there is a one-year statute of limitation for filing a § 2255 motion. *See* 28 U.S.C. § 2255. The § 2255 motion was received by the Court and filed on April 25, 1997.

It appears from the record that Frazier's judgment of conviction became final on October 29, 1991. Application of the one year statute of limitation pursuant to 28 U.S.C. § 2255 would deny Frazier notice and opportunity to act accordingly. In this case, it would be entirely unfair to apply the new requirement of the AEDPA, that a motion filed pursuant to 28 U.S.C.§ 2255 be filed within one year after the judgment of conviction becomes final since that period ended prior to the effective date of the Act.

There is a split of authority on the issue of applying the new one-year limitation period of the AEDPA to collateral review claims filed by prisoners after the effective date of the AEDPA, where the date the defendant's judgment became final would *per se* preclude the filing of a motion/petition pursuant to § 2255/§ 2244 under a literal reading of the one-year statute of limitations amendment. *Lindh v. Murphy,* 96 F.3d 856, 866 (7th Cir, 1996) (en banc) *cert. granted,* 117 S. Ct. 726, 136 L. Ed. 2d 643 (1997) *rev'd on other grounds,* 1997 WL 338568 (U.S. June 23, 1997) (addresses application of statute of limitations to § 2254 case); *Duarte v. Hershberger,* 947 F. Supp. 146, 149 (D.N.J. 1996) (addresses application of statute of limitations to § 2254 case); *Smith v. United States,* 945 F. Supp. 1439, 1141 (D,Colo. 1996) (addresses application of statute of limitations to § 2255 case); *Flowers v. Hanks*, 941 F. Supp. 765, 771 (N.D. Ind. 1996) (addresses application of statute of limitations to § 2255 case); *United States v. Ortiz*, 1997 WL 214934 *3-*5 (E.D. PA 1997) (addresses application of statute of limitations to § 2255 case). This Court will follow the authority holding that any § 2255 motion filed within one year from the effective date of the AEDPA, will be considered timely.

Frazier is entitled to one year grace period from the time the statute was enacted. Frazier's judgment of conviction became final and his one year anniversary date expired prior to the enactment of the AEDPA. Therefore, the time for filing a § 2255 motion in his case is one year

from the effective date of the AEDPA. Frazier's § 2255 motion was stamped filed, by the Clerk's office on April 25, 1997. According to the law and cases, a motion filed by a prisoner is deemed filed when given to the prison authorities for mailing. *In re Sims,* 111 F.3d 45, 47 (6th) Cir. 1997), *citing Houston v, Lack,* 487 U.S. 266, 270-71 (1988); *See* Rule 4(c) FED. R. APP. PROC. However, this rule only applies to documents filed by prisoners if the inmate actually places the complaint in the prison mail system. *Redd v. Gilless*, 857 F.Supp. 601, 604-05 (W.D. Tenn. 1994). A prisoner does not have the benefit of this rule if he gives the document to anyone other than a prison official to mail. *Id.* at 604. In the case before the Court, this rule does not apply because Frazier's § 2255 motion was filed by Frazier's attorney. Therefore, Frazier's motion was filed on April 25, 1997.

The Court must calculate the one year time period to determine the last day Frazier could have timely filed his § 2255 motion. The one year statute of limitation was enacted and signed into law on April 24, 1996. THE RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURT do not include a rule which governs computation of time. However, Rule 12 of the RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURT provides the following:

> If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statue, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

> Rule 6 of the FEDERAL RULES OF CIVIL PROCEDURE provides in pertinent part:
>
> (a) **Computation.** In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included…
>
> Rule 45 of the FEDERAL RULES OF CRIMINAL PROCEDURE provides in pertinent part:
>
> (a) **Computation.** In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, …

"The long-established general rule is that a statute of limitations begins to run on the day following the day on which the event giving rise to the cause of action occurred." *United State of America v. Guerro,* 694 F.2d 898, 901 (2nd Cir. 1982) *cert. denied,* 459 U.S. 1222 (1983) *citing Burnet v. Willingham Loan & Trust Co.,* 282 U.S. 437, 439 (1931); *See also United States of America v. Butler,* 792 F.2d 1528, 1532 (11th Cir.) *cert denied,* 479 U.S. 933 (1986); *Simmons v. Firestone Tire & Rubber Co.,* 747 F. Supp. 1256, 1257-58 (W.D. Tenn. 1990). This principle has been applied in civil and criminal cases. *United States of America v. Guerro,* 694 F.2d at 901. The general rule has been adopted in Rule 6(a) of the FEDERAL RULES OF CIVIL PROCEDURE and Rule 45(a) of the FEDERAL RULES OF CRIMINAL PROCEDURE. *Simmons v. Firestone Tire & Rubber Co.,*

747 F. Supp. at 1257-58. The exception to the general rule which counts the first day and excludes the last day, has generally been applied in individual cases where hardship might otherwise occur. *Id.* at 1258.

The Sixth Circuit has ruled that Rule 6(a) of the FEDERAL RULES OF CIVIL PROCEDURE provides the means of determining the beginning and end of a statute of limitations prescribed elsewhere in the law. *Merriweather v. City of Memphis,* 107 F.3d 396, 399-400 (6th Cir.1997); *Bartlik v. United States Dept. of Labor,* 62 F.3d 163, 166 (6th Cir. 1995) (en banc). Applying Rule 6(a) of the FEDERAL RULES OF CIVIL PROCEDURE and by analogy Rule 45(a) of the FEDERAL RULES OF CRIMINAL PROCEDURE, the Court does not include the day the statute was enacted but does include day 365. Therefore, April 25, 1996 is day number 1 and April 24, 1997 is day number 365. The time for filing a § 2255 motion in his case was no later than April 24, 1997, which is one year from the effective date of the AEDPA. *See Kapral v. United States of America,* 1997 WL 447575 (D. N.J. July 28, 1997). Since Frazier's § 2255 motion was filed on April 25, 1997, it is time-barred by the statute of limitations.

Counsel for Frazier contends that she was advised by the Clerk's office that the date of mailing would be adequate for filing Frazier's § 2255 motion. If counsel relied upon this, such reliance was misplaced. The Local Rules of the United States District Court for the Eastern District of Tennessee notify everyone that court personnel assume no responsibility for misinformation regarding applicable procedural rules, substantive law, or interpretation of the local rules of the Court. E.D.T.N. LR 77.1

Accordingly, the Government's motion to dismiss (Court File No. 7) is **GRANTED** and Frazier's § 2255 motion (Court File No. 1) is **DISMISSED**.

In addition, the Court has reviewed this case pursuant to 28 U.S.C. § 1915(a)(3) and Rule 24 of the FEDERAL RULES OF APPELLATE PROCEDURE and hereby

CERTIFIES that any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, any application by Frazier for leave to proceed *in forma pauperis* on appeal is **DENIED**. 28 U.S.C. § 1915(a)(3); FED. R. APP. P. 24.

If any appeal is taken from this action, the issue would be whether this § 2255 motion was timely filed. This Court did not consider the merits of any issue Frazier raised in the § 2255 motion because the Court found that the motion was not timely filed. Therefore, should Frazier give timely notice of an appeal from this Order, such notice will be treated as an application for a certificate of appealability, which is hereby **DENIED** since he has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Rule 22(b) of the FEDERAL RULES OF APPELLATE PROCEDURE.

SO ORDERED.

ENTER:

/s/ R. Allen Edgar----------
United States District Judge

No. 97-6338

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARRELL FRAZIER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

MOTION TO DISMISS APPEAL
FOR LACK OF JURISDICTION WITH
ACCOMPANYING MEMORANDUM OF LAW

MOTION

Comes now the United States of America, by and through Steven H. Cook, Assistant United States Attorney for the Eastern District of Tennessee, and moves this Honorable Court to dismiss the instant appeal for lack of jurisdiction. In support of this motion, the United States would show the following:

1. On November 10, 1997, Petitioner-Appellant, through counsel, filed his Notice of Appeal in the United States District Court for the Eastern District of Tennessee.

2. The Notice of Appeal filed by Petitioner-Appellant did not comply with rule 3(c) of the Federal Rules of Appellate Procedure in that it did not name the court in which Petitioner was appealing.

MEMORANDUM OF LAW

In *United States v. Webb*, __ F.3d __, No. 97-1116, 1998 WL 670334 (6th Cir. Oct. 1, 1998), this Court held that compliance with rule 3(c) of the Federal Rules of Appellate Procedure is jurisdictional. The rule provides in pertinent part as follows:

> The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order, or part thereof appealed from; and shall name the court to which the appeal is taken. . . .

Fed. R. App. P. 3(c) (emphasis added). A notice of appeal such as Petitioner-Appellant's, which fails to name the court to which the appeal is taken, it defective. Since the requirements of rule 3(c) are jurisdictional, this Court lacks jurisdiction over the instant appeal and the appeal should be dismissed. *Webb*, at *3.

Respectfully submitted,

Carl K. Kirkpatrick
United States Attorney

By: /s/ Steven H.-Cook
Assistant United States Attorney
800 Market Street, Suite 211
Knoxville, Tennessee 37902
(423) 545-4167

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was placed in the United States mail, postage prepaid, to Marcia G. Shein, Counsel for Petitioner-Appellant, 52 Executive Park South, Suite 5203, Atlanta, Georgia, this 15th day of October 1998.

/s/ Mary Ann Hull
Mary Ann Hull
Paralegal Specialist